IN THE

Supreme Court of the United States

October Term, 1960

No. 495

COMMUNIST PARTY, U. S. A. and COMMUNIST PARTY OF NEW YORK STATE,
Petitioners,

v.

MARTIN P. CATHERWOOD,
as Industrial Commissioner.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF FOR PETITIONERS

JOHN J. ABT,
320 Broadway,
New York 7, N. Y.,
Attorney for Petitioners.

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Opinions Below

The opinions of the Court of Appeals of New York are reported in 8 N. Y. 2d 77 and appear at R. 36.[1] The opinion of the Appellate Division, Third Department, of the Supreme Court of New York is reported in 8 App. Div. 2d 918 and appears at R. 33.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on May 26, 1960 (R. 46). On July 15, 1960, an order was entered by Mr. Justice Frankfurter extending

[1] "R." designates the record as printed in this Court and "Tr." the record as printed for the use of the Court below.

the time for filing a petition for certiorari to October 24, 1960 (R. 49). The petition for certiorari was filed on October 20, 1960 and was granted on December 12, 1960 (R. 50).[2] Jurisdiction of this Court is conferred by 28 U. S. C. 1257.

Statutes Involved

The pertinent provisions of the Communist Control Act of 1954 (50 U. S. C. 841-44), the New York Unemployment Insurance Law (Labor Law, secs. 500-643), and the Federal Unemployment Tax Act (26 U. S. C. Chap. 23), are set forth in Appendix A.

Questions Presented

1. Whether the Court of Appeals erred in construing section 3 of the Communist Control Act of 1954 (50 U. S. C. 842) as terminating the liability of petitioners to taxation as employers under the New York Unemployment Insurance Law.

2. Whether the Court of Appeals erred in holding that section 3 of the Communist Control Act, on its face and as construed and applied, does not violate the Constitution of the United States.

3. Whether the Court of Appeals erred in holding that the action of the respondent Industrial Commissioner in refusing to accept unemployment insurance taxes from petitioners and in suspending their registrations as contributing employers under the New York Unemployment Insurance Law does not deny petitioners due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

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[2] On the same date, the Court also granted petitioner's motion for leave to substitute Martin P. Catherwood for Isador Lubin as the party respondent (*ibid.*).

Statement of the Case

The ultimate issue which this case presents is the validity of the action of the Industrial Commissioner in determining that petitioners are not liable to be taxed as employers under the New York Unemployment Insurance Law and in refusing to accept further tax payments from them. The Industrial Commissioner's action injures petitioners in two respects. First, it triples their taxes under the coordinated system of federal and state unemployment insurance taxation (see *infra*, pp. 6-8). Second, it handicaps them in securing and retaining employes by rendering it doubtful, at best, whether an applicant for unemployment insurance will receive credit for his employment by petitioners subsequent to the Commissioner's action (see *infra*, p. 6, n. 9).

The action of the Industrial Commissioner was taken in March, 1957. For the preceding twenty years, the Industrial Commissioner had collected taxes from petitioners as employers liable to "contributions"[3] under New York's Unemployment Insurance Law and had paid out unemployment insurance benefits based on employment by petitioners (R. 22, 25, 34). Like all other taxable employers, each petitioner had been assigned a registration number identifying it for collection and accounting purposes (R. 34).[4]

In January, 1957, in response to an inquiry from the Industrial Commissioner, the Attorney General of New York rendered an opinion (Appendix B to this brief) that petitioners are not subject to taxation under the Unemployment Insurance Law and that employment by them should not be credited as a basis for benefits under the law. The

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[3] The term used in the Unemployment Insurance Law to denote the taxes which it levies on employers with respect to the wages paid by them. See Labor Law, Sec. 570.

[4] Registration is an administrative device adopted by the Commissioner but not provided for in the Unemployment Insurance Law.

opinion does not cite any provision of the Unemployment Insurance Law or other state statute to support these conclusions. It relies on sections 2 and 3 of the Communist Control Act and other legislative and judicial characterizations of petitioners and concludes (*infra*, p. 48) that "the Communist Party is a conspiracy against the Government of the United States and of this State," and therefore "it would be an anomaly in law, not to say amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program."

Acting pursant to the Attorney General's opinion, the Industrial Commissioner in February, 1957 denied the application of one Albertson for insurance benefits based upon his former employment by the National Party (R. 3, Tr. 44). The following month, again pursuant to the Attorney General's opinion, the Commisisoner notified each petitioner that he had suspended its registration as an employer liable to unemployment insurance contributions and that it should pay no further contributions (R. 14, 17). Administrative review of the determinations of the Industrial Commissioner with respect to Albertson and each petitioner was had in statutory proceedings before an unemployment insurance referee[5] who consolidated the three cases (R. 3).

The Industrial Commissioner offered no evidence at the hearing before the referee but relied exclusively on the opinion of the Attorney General which had prompted his rulings (R. 20, 23-24). The only evidence with respect to the nature of the activities of the petitioners or their employees was the testimony of Albertson that he had been employed by the National Party[6] as an assistant labor sec-

[5] Labor Law, Sec. 620. Secs. 621-626 provide for an administrative appeal to the Unemployment Insurance Appeal Board and for judicial review.

[6] We so refer to Communist Party, U. S. A. Communist Party of New York State is referred to as the "State Party."

retary with the duties of studying trends in the labor movement and analyzing proposed labor legislation (R. 21).

The referee sustained the Industrial Commissioner both in determining that petitioners are not liable for contributions to the unemployment insurance fund and in denying Albertson insurance benefits based on his employment by the National Party (R. 10, 11). He did so on the ground that sections 2 and 3 of the Communist Control Act declaring that "the Communist Party should be outlawed" and depriving the Party and its subsidiaries of rights, privileges and immunities, terminated the right of petitioners to have employees and, in consequence, extinguished their liability to taxation as employers (R. 6-11). The Unemployment Insurance Appeal Board affirmed these rulings (R. 1-2).

The Appellate Division reversed unanimously. It held that the Communist Control Act did not terminate petitioners' liability for contributions to the state unemployment insurance fund or deprive their employees of credit for unemployment insurance benefits (R. 33).

A divided Court of Appeals, reversing the Appellate Division, held that petitioners are not liable to taxation under the state law. However, it affirmed the decision of the Appellate Division that Albertson was entitled to credit for his employment by the National Party in determining his unemployment insurance benefits. (R. 36-45.)[7]

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[7] Albertson's claim for benefits involved another issue not material here—his right to credit for employment by the Civil Rights Congress, an alleged "Communist-front" organization. The referee ruled that Albertson was entitled to such credit and hence should be paid benefits, although in an amount less than he would receive were he also credited with his employment by the National Party (Tr. 26-27). The Unemployment Insurance Appeal Board, reversing the referee, disallowed credit for the Civil Rights Congress employment and held Albertson ineligible for benefits (Tr. 11-13). This issue is not mentioned in the opinions below, but the effect of the judgment is to credit Albertson with his employment by the Civil Rights Congress as well as by the National Party.

The six judges who participated in the case handed down three separate opinions, two judges joining in each.[8] The prevailing opinion construed section 3 of the Communist Control Act as depriving petitioners of the status of employers under the Unemployment Insurance Law for "whatever value the status may have" and held that the act, as so construed, is constitutional. It further held, however, that since Albertson's employment by the National Party ended before the Industrial Commissioner suspended the latter as an employer liable to contributions, "it would be unreasonably punitive" to deny him his insurance. (R. 36-39.)[9] Another opinion concurred with the first as to the construction and constitutionality of the Communist Control Act and its effect upon petitioners, but held that Albertson was not entitled to unemployment insurance (R. 44-45). The third opinion held that the Communist Control Act did not affect petitioners' liability to taxation under the state law or Albertson's right to insurance benefits (R. 39-44).

As previously noted, the effect of the action of the Industrial Commissioner and its affirmance below is to triple petitioner's tax liability under the system of interrelated federal and state unemployment insurance taxation.

When petitioners were liable to state taxation, they enjoyed low tax rates under New York's experience rating

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[8] Judge Foster, who was the presiding judge of the Appellate Division when the case was heard and decided there, did not participate (R. 45).

[9] The opinion reserved the question of the status of claims for benefits based on employment by one of the petitioners subsequent to the action of the Industrial Commissioner (R. 39). However, the logic of the opinion would seem to require the denial of such claims. And the Industrial Commissioner's brief in opposition to the petition for certiorari states (p. 1, n.): "Suspension of registration as an employer results in the exclusion of the employer from the operation of the Unemployment Insurance Law so that it is thereby deprived of the opportunity of affording to its employees the benefits of the law. It is thus gravely handicapped in securing employees."

plan which reduces the normal rate of 2.7% of payroll for those employers who have records of maintaining steady employment.[10] At the time the Industrial Commissioner terminated their liability to taxation, the tax rate of the National Party was 0.7% of its payroll and that of the State Party was 0.8% of its payroll (R. 25).[11]

Despite the action of the Industrial Commissioner, the Bureau of Internal Revenue has continued to collect taxes from petitioners under the Federal Unemployment Tax Act, 26 U. S. C. 3301-3308 (R. 34, 38, 40, 41). That act taxes employers at the rate of 3% of their payrolls[12] but allows a credit against the tax for payments made to state unemployment insurance funds (secs. 3301, 3302). In the case of an employer who makes payments to the fund of a state which, like New York, has an approved experience rating plan, the credit results in a federal rate of taxation of either 0.3% or the difference between 3% and the maximum rate specified in the state law, whichever rate is higher (sec. 3302 (b), (c)(1) and (d)(1). Since the maximum rate provided by the New York law is 3.2% (see ftn. 10, *supra*), employers who are taxed by New York pay a federal tax at the 0.3% rate. Accordingly, so long as New York taxed

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[10] The 2.7% rate is specified in Section 570 of the Labor Law. Section 581 provides for experience rating in accordance with a complex formula, the material features of which have been described as follows: "Newly liable employers * * * are taxed at the rate of 2.7% on wages * * * paid during a calendar year. Older firms are taxed at individual rates which may be as high as 3.2% and as low as zero % depending upon their individual experience with unemployment and on the adequacy of the Unemployment Insurance Fund as a whole." *1960-61 Handbook for Employers*, N. Y. Department of Labor, Division of Employment, p. 20.

[11] The reference is to the evidence with respect to the National Party. The State Party's tax rate appears from the Industrial Commissioner's records and is not disputed.

[12] Increased to 3.1% for 1961 and thereafter by amendment to Section 3301 adopted September 13, 1960.

petitioners, their liability for state and federal taxes aggregated 1% of payroll for the National Party and 1.1% for the State Party.[13] The termination of petitioners' liability to state taxation tripled their tax burden by depriving them of the credit they previously enjoyed under section 3302 of the federal act and subjecting them to taxation at the full 3% rate specified in section 3301.[14]

Summary of Argument

I. The court below erroneously construed and applied section 3 of the Communist Control Act.

A. Section 3 terminates certain rights, privileges and immunities of petitioners. New York's Unemployment Insurance Law, however, does not grant any rights, privileges or immunities but imposes a liability to pay taxes. Section 3 does not purport to extinguish petitioners' liabilities.

The Unemployment Insurance Law does not grant a right to be listed or enrolled as an employer. Such listing is merely a bookkeeping incident to the liability of employers to taxation. It is true that, under the circumstances of this case, liability to state taxation benefits petitioners by reducing their aggregate tax payments under the state and federal laws and by providing an inducement for the

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[13] A state tax at the rate of 0.7% for the National Party and 0.8% for the State Party plus, in each case, the 0.3% federal tax.

[14] On November 21, 1958, while petitioner's appeal from the ruling of the Appeal Board was pending in the Appellate Division, the Bureau of Internal Revenue notified each petitioner of a tax deficiency resulting from the termination of its contributions to the state unemployment insurance fund and the increase in the applicable federal rate from 0.3% to 3%. Petitioners' attorney advised the Bureau of the pendency of litigation to reverse the ruling of the Industrial Commissioner, and the Bureau has continued to accept payments at the 0.3% rate.

acceptance of employment with them. But the incidence of these benefits does not transmute the liability of petitioners to taxation into a "right to be taxed."

B. Respondent argues that the obligation to pay the unemployment insurance tax arises from the exercise of the right to be an employer; that section 3 terminated this right as to petitioners and therefore extinguished their concomitant liability to taxation. Respondent's argument is fallacious because section 3 does not terminate the right of petitioners to be employers.

1. Section 3 terminates only those rights of petitioners "which have heretofore been granted * * * by reason of the laws of the United States or any political subdivision thereof." The right of natural persons to employ others is not a right granted them by government. It is a natural, inherent, or inalienable right. Accordingly, it is not among the rights which section 3 purports to terminate.

Petitioners are unincorporated associations. In New York, these are not artificial entities owing their existence to a franchise from the state but are creatures of contract having no existence independent of their members. Accordingly, the right that is in issue here is the right of petitioners' members, collectively, to employ others. That right is no less an inherent right than the right of a single member to be an employer.

2. Assuming that the right of petitioners to be employers is a granted and not an inherent right, it is a right granted by the laws of New York and not of the United States. Section 3 terminates rights granted petitioners "by reason of the laws of the United States or any political subdivision thereof." This provision does not affect rights granted by state law. For the states are not "political subdivisions" of the United States. Moreover, if Congress had intended to take the extraordinary step of extinguishing rights granted by the states, it would have done so without equivocation.

Interpretation of section 3 to exclude rights granted by state law is also required by constitutional considerations. Section 3, as construed below, deprives petitioners of the right to employ persons for any purpose whatsoever. But under its granted powers and the Tenth Amendment, Congress may not regulate, much less terminate, rights dependent solely on state law and unrelated to any matter within the competence of the national government.

3. Notwithstanding the recital of section 2 of the Communist Control Act that "the Communist Party should be outlawed" and the termination of rights provided in section 3, Congress intended to permit the Party to continue to function through employees, officers and agents. This appears from numerous provisions of that Act, including the proviso of section 3 that it shall not be construed as amending the Internal Security Act.

C. The construction of section 3 by the court below is without support in the legislative history and is contrary to the construction of the section by the federal executive and by Congress.

A review of the legislative history reveals that section 3 was not the subject of any committee report but was added to the legislation on the floor of the House without committee consideration. The floor debates cast no light on the intention of Congress with respect to section 3 but merely document Senator Kefauver's observation that, "In this matter, I think we are giving a clear and impressive picture of how legislation should not be written."

The federal authorities have taken no action in any field to apply the fiat deprivation of rights, privileges and immunities contained in section 3. The Bureau of Internal Revenue, although aware of the Industrial Commissioner's ruling, continues to tax petitioners as employers under the Federal Unemployment Tax Act and the Federal Insurance Contributions Act. Similarly, a Social Security Ad-

ministration referee ruled, subsequent to enactment of the Communist Control Act, that petitioners are employers whose retired employees are entitled to old age benefits. *Matter of Foster.*

Subsequent to the *Foster* decision, Congress amended the Social Security Act and the Insurance Contributions Act to exclude from coverage and taxation services in the employ of an organization only after the date on which it is finally ordered to register as a Communist-action or Communist-front organization under the Internal Security Act. By this legislation, Congress acquiesced in the proposition acted on by the Bureau of Internal Revenue and the referee in *Foster* that petitioners remain liable to employment taxes notwithstanding the enactment of the Communist Control Act. Moreover, if Congress had construed the Communist Control Act as terminating the liability of petitioners to taxation as employers, it would not have amended the Insurance Contributions Act in a manner which will exclude them from such taxation only in the event that they are finally ordered to register as Communist-action organizations.

II. Section 3 of the Communist Control Act is unconstitutional on its face and as applied below.

A. Section 3 violates the due process clause of the Fifth Amendment.

1. The evil with which the Communist Control Act purports to deal is the threat to the national security from activities of the Communist Party described in section 2. But section 3 is not restricted to the prohibition or control of Party activities which threaten the national security. As construed and applied below, the section deprives petitioners of the right to engage, through employees or otherwise, in lawful and peaceable conduct. Accordingy, the section violates the due process principle that legislation must be "reasonably restricted to the evil with which it is said to deal."

2. Section 3 deprives petitioners of liberty and property. The justification for the deprivation, as stated in section 2, is that petitioners are members of a criminal conspiracy, controlled by a hostile foreign power, to overthrow the government. The Act accords petitioners no hearing on this charge but deprives them of their liberty and property solely on the basis of the legislative fiat. The Act, therefore, violates the requirement of a hearing on charges which are relied upon to support a deprivation of rights protected by due process.

B. Section 3 is a bill of attainder. It imposes punishment because the deprivation of rights which it decrees is based solely on criminal conduct attributed to petitioners and because nothing that the "persons proscribed by its terms could ever do would change the result." Moreover, section 3 was "aimed at the persons or classes of persons disqualified" rather than at any particular activity. The proposition that section 3, as construed below, is a bill of attainder is also established by *United States* v. *Lovett*.

C. Section 3 is an *ex post facto* law because it imposes punishment for past conduct in addition to that previously prescribed and does so without requiring any proof of such conduct.

D. As shown in Point I B 2, section 3, as construed below, is not within the competence of Congress and violates the Tenth Amendment.

IV. The action of the Industrial Commissioner denied petitioners due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

The prevailing opinion seems at some points to hold that petitioners' status as contributing employers under the New York Unemployment Insurance Law was terminated, not by section 3 of the Communist Control Act, but by action on the part of New York. And the amended remittitur states that the court below held that the action of the In-

dustrial Commissioner in suspending petitioners as contributing employers did not violate the due process or equal protection clauses of the Fourteenth Amendment.

The sole justification for the action of the Industrial Commissioner, when viewed as state action, was the opinion of New York's Attorney General pursuant to which the action was taken. Accordingly, it is this opinion which must be looked to in determining whether the Industrial Commissioner's action, depriving petitioners of liberty and property, denied them due process or equal protection.

A. The ruling of the Attorney General was based on his allegation that the Communist Party is a conspiracy against the government. Yet, there is no instance in which an employer has been excepted from coverage under any of New York's social insurance laws even after a conviction for conducting his affairs in violation of the criminal laws. The action of the Industrial Commissioner in singling out petitioners was therefore arbitrary as well as discriminatory. Accordingly, it denied them due process and equal protection.

B. The action of the Industrial Commissioner violates the principle applied in *Sweezy* v. *New Hampshire*. For this case, like *Sweezy*, presents a situation equivalent to one where it appears that "no state interest underlies the state action." For although the state legislature had frequent occasion to do so, it never authorized the Industrial Commissioner to take the action that he did or gave other indication that the exclusion of petitioners from unemployment insurance taxation was in the interest of the state.

C. Since the action of the Industrial Commissioner was taken without a hearing on the Attorney General's charges against petitioners, the action violated the due process principle stated in Point II A 2. Under the decision below, it was not open to petitioners to disprove the Attorney General's charges at the hearing before the referee. Moreover, an opportunity to petitioners to disprove charges

which would otherwise have been taken as true would not have satisfied due process.

D. Assuming a discernible state interest in excluding petitioners from taxation with respect to their employment of employees engaged in illegal activity, the action of the Industrial Commissioner violates due process because the exclusion is not so restricted.

ARGUMENT

I. The court below erroneously construed and applied section 3 of the Communist Control Act.

A. The obligation to pay unemployment insurance taxes is not a right, privilege or immunity.

Section 3 of the Communist Control Act terminates "whatever rights, privileges and immunities which have heretofore been granted to [petitioners] by reason of the laws of the United States or any political subdivision thereof." Assuming that New York is a "political subdivision" of the United States (see *infra*, p. 19), its Unemployment Insurance Law does not grant petitioners any right, privilege or immunity. On the contrary, the law imposes a liability upon them—the liability to pay taxes.[15] Since the Communist Control Act does not purport to and obviously was not intended to extinguish the liabilities of petitioners, it does not affect their liability to unemployment insurance taxation. Two members of the Court of Appeals and an unanimous Appellate Division so held (R. 35, 43-44).

The prevailing opinion itself acknowledges (R. 37) that, "Of course, paying a tax is not really claiming an 'immunity' or 'right.'" It states however (*ibid.*), that "with the payment of this particular tax goes a status and enrollment as an employer," and adds that "whatever value that

[15] As the dissenting opinion states (R. 43-44), "the status of an employer under the Unemployment Insurance Law involves, and is expressly denominated a 'liability' (see, *e.g.*, Labor Law, Secs. 560, 561, 562, 570, 572, 579), the duty to pay 'an excise tax.'"

status may have is being sought and claimed by the Communist Parties in this proceeding." The opinion also refers to "the alleged rights of Communist Parties to recognition and listing," and states that petitioners "are demanding that they be restored to this State's list of employers" (R. 37, 38). Thus the prevailing opinion seems to reason that the Unemployment Insurance Law creates a "right" to be enrolled or listed as an employer; that section 3 of the Communist Control Act terminated this right with respect to petitioners, and that their liability to taxation was somehow extinguished along with the right. This reasoning is palpably unsound.

The opinion does not cite any provision of the Unemployment Insurance Law for the "enrollment" or "listing" of which it speaks and the Law contains no such provision. Apparently what the opinion refers to is the Industrial Commissioner's practice of assigning a registration number to each taxable employer to identify it for the purposes of collection and accounting.[16]

Registration does not confer any rights upon employers. It is merely a bookkeeping incident to their liability to taxation.[17] Contrary to the statement in the prevailing

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[16] "Each employer liable for tax is assigned an Employer Registration Number * * * This number—and *no other*—should be shown on all correspondence and forms submitted by the Employer to this Division." *1960-61 Handbook for Employers, supra*, p. 12, emphasis in the original. "All liable employers are required to submit each quarter reports of total remuneration (see pp. 15-16), and wages (see p. 15) for the purpose of determining the amount of quarterly tax due. This form is mailed to registered employers in advance of the due date and carries the employer's name, address and Employer Registration Number." *Id.*, p. 14. "For every employer subject to the Law an individual account is set up as a bookkeeping device for measuring his Benefit Experience, the principal factor in determining his tax rate." *Id.*, p. 20.

[17] Conversely, the suspension by the Industrial Commissioner of the registrations of petitioners (R. 15, 18) was simply the bookkeeping expression of his determination that petitioners are not subject to taxation.

opinion (R. 38), petitioners are not "demanding that they be restored to this State's list of employers." Nor are they claiming (R. 37) "whatever value that status has" for it has none. What petitioners are demanding is recognition of their liability to taxation under the Unemployment Insurance Law and acceptance by the Industrial Commissioner of the taxes which the Law levies upon them.

It is true that liability to the state tax, in the circumstances of this case, benefits petitioners (1) by substantially reducing their aggregate tax payments under the state and federal laws and (2) by providing their employees with the certainty of insurance coverage as an inducement to employment (see *supra*, pp. 6-8). But the incidence of these benefits does not transmute the liability of petitioners to taxation into a "right to be taxed."

B. Section 3 of the Communist Control Act does not terminate the right of petitioners to be employers.

Respondent argues (Brief in Opposition to Petition for Certiorari, pp. 12-13) that while the tax imposed by the Unemployment Insurance Law creates an obligation and not a right, the obligation arises only from the exercise of a right—the right to be an employer[18] and to enter into contracts of employment. His contention is that section 3 of the Communist Control Act terminated this right of petitioners and therefore extinguished their concomitant liability to taxation. This theory of the case was first enunciated by the referee (R. 6-7) and also appears in the concurring opinion below (R. 45). The theory rests on a fallacious interpretation of section 3, which, as we will show, does not terminate the right of petitioners to be employers.

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[18] The term "employer" is broadly defined by Labor Law, Sec. 512 as "any person, partnership, firm, association, public or private, domestic or foreign corporation * * *."

1. *Section 3 does not terminate natural or inherent rights.*

Section 3 does not purport to terminate all rights of the petitioners but only those "which have heretofore been granted * * * by reason of the laws of the United States or any political subdivision thereof." The right of natural persons to employ others is not a right granted them by government. It is a natural or inherent right, included among the inalienable rights, referred to in the Declaration of Independence, with which all men are endowed and to secure which governments are instituted. *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 537; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 762 (concurring opinion); *Lochner* v. *New York*, 198 U. S. 45, 65 (dissenting opinion); *Coppage* v. *Kansas*, 236 U. S. 1, 14; *Stewart Machine Co.* v. *Davis*, 301 U. S. 548, 580. Accordingly, were petitioners natural persons, their right to be employers would not be among the rights terminated by section 3.[19]

Petitioners are unincorporated associations (R. 38). The prevailing opinion states (*ibid.*) that "all rights of unincorporated associations are created by and dependent upon the State." No authority is cited for this statement and it is palpably erroneous. In New York, an unincorporated association, unlike a corporation, is not an artificial entity and does not owe its existence to a franchise from the state. The author of the prevailing opinion himself has held that an unincorporated association "is not an artificial person and has no existence independent of its members."[20] *Martin* v. *Curran*, 303 N. Y. 276, 280. Similarly, it has been stated that, "Unincorporated associations are mere

[19] At this point, we do not consider whether Congress *could* terminate natural rights of the petitioners but only whether it *did* terminate them.

[20] Cf. his holding in the present case (R. 37) that as a result of section 3 "the artificial body or entity calling itself the Communist Party is to be deprived of all the 'rights, privileges and immunities' that other such entities have."

creatures of contract freely formed at common law without any grant from the sovereign." *People* v. *Norwegian Underwriters*, 247 N. Y. S. 707, 711. And see *Ostrom* v. *Greene*, 161 N. Y. 353, 361.

The only right that New York has granted to unincorporated associations is the right to sue in the names of their presidents or treasurers. General Association Law, sec. 12. This statute modifies the common law rule that all members of an unincorporated association are necessary parties to an action by or against it. *Van Aernam* v. *Bleistein*, 102 N. Y. 355, 358. However, the modification was made for convenience only "and created no new substantive right." *Martin* v. *Curran*, *supra*, at 281.

Accordingly, the right that is in issue here is the right of petitioners' members, collectively, to employ others. That right is no less an inherent right than the right of a single member to be an employer. Hence, it is not among the rights which section 3 purports to terminate.[21]

2. *Section 3 does not terminate rights granted by state law.*

If, contrary to what we have shown, the right of petitioners to be employers is held to be a granted rather than an inherent right, it is a right granted by the laws of New York and not the United States. The prevailing opinion below acknowledged as much, stating (R. 38) that "all rights of unincorporated associations are created by and dependent upon the State." By the same token, section 3 does not disturb these rights.

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[21] Not even the respondent contends that section 3 terminated petitioners' statutory right (ftn. 5, *supra*) to secure review of determinations of the Industrial Commissioner, and that this proceeding must therefore be dismissed. Respondent's restraint is the more remarkable in view of his assertion that petitioners are beyond the pale of due process and the Bill of Rights. Brief in Opposition to Petition for Certiorari, pp. 16-18.

Section 3 purports to terminate all rights granted to petitioners "by reason of the laws of the United States or any political subdivision thereof." This provision does not affect rights which petitioners enjoy by virtue of state law. For the states are not "political subdivisions" of the United States. A subdivision is, "A part of a thing made by subdividing." Webster, *New International Dictionary*. The states, of course, were not "made by subdividing" the nation but themselves "made" the United States.[22]

Moreover, if Congress had intended to take the extraordinary step of extinguishing rights granted by the states, it would have done so without equivocation. As the dissenting opinion below states (R. 44), "If Congress had been intent upon depriving the Communist Party of its ability to enter into contracts or hire employees, it could easily and unmistakable have so provided."

To interpret section 3 as terminating rights granted by state law is not only contrary to its text but violates the principle that, wherever possible, statutes should be construed so as to avoid questions of constitutionality. *United States* v. *Rumely*, 345 U. S. 41; *United States* v. *Witkowvich*, 335 U. S. 194; *United States* v. *Five Gambling Devices*, 346 U. S. 441.

As construed below, section 3 deprives petitioners of the right to employ persons for any purpose whatsoever. But under its granted powers and the Tenth Amendment, Congress may not legislate with respect to rights which are dependent solely on state law. It may not, for example,

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[22] Significantly, the first clause of Section 3 speaks of "the Government of the United States, or the government of any *State*, Territory, District or Possession thereof, or the government of any political subdivision therein" (emphasis supplied). Section 4 is similarly worded as is 18 U. S. C. 2385. As this wording shows, Congress understands the distinction between a state and a political subdivision, and does not use the latter when it means the former.

restrict the right of an employer to fix the wages and hours of employees whose employment does not substantially affect interstate commerce. *United States* v. *Darby*, 312 U. S. 100, 117. Obviously, therefore, it may not extinguish the right to be an employer of such employees. Nor, in the exercise of the defense power, may it abrogate a right granted by state law, the exercise of which has no conceivable relation to the national defense.[23]

Accordingly, assuming that the right of petitioners to be employers was granted them by the laws of New York, section 3 of the Communist Control Act may not be construed as terminating that right.[24]

3. *The Communist Control Act contemplates that the Communist Party will continue to have and to act through employees.*

The text of the Communist Control Act makes it clear that, notwithstanding the recital of section 2 that "the Communist Party should be outlawed"[25] and the termination of rights provided in section 3, Congress intended

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[23] E.g. the right of the National Party to employ Albertson to study trends in the labor movement and analyze proposed labor legislation (R. 21).

[24] In the only proceeding other than the present one involving an application of Section 3, it was held that the section abrogated the right of a candidate for state office to run on the Communist Party ticket, *Selwen* v. *Recs*, 16 N. J. 216. The opinion was oral and the case seems to have been inadequately briefed and argued. The question of statutory construction discussed above was not considered, and the constitutional questions argued in Point II, *infra*, do not appear to have been raised or decided. For a criticism of the decision see Comment in 53 Mich. L. R. 1153, 1160.

[25] In oral argument of *Communist Party* v. *Subversive Activities Control Board*, No. 12, this Term, the Solicitor General stated that this recital has no legal consequence or effect.

to permit the Party to continue to function through employees, officers and agents.[26]

Thus, section 5 of the Act assumes that the Party will continue to have and to act through "officers", "agents" and "organizers" (paragraphs (5), (6), (7) and (11)). Moreover, if the rights terminated by section 3 include the right to have employees, they must also include the right to have members since no distinction in principle can be drawn between the two. But section 4 contains provisions concerning any person who "becomes or remains a member" of the Communist Party and section 5 enumerates thirteen indicia of membership.

Furthermore, section 3 provides that it shall not be construed as amending the Internal Security Act (50 U. S. C. 781 *et seq.*). The latter permits the Communist Party to have officers and members even if it is finally ordered to register as a Communist-action organization. For section 7(d) (50 U. S. C. 786(d)) requires all registrants to list the names of their officers and members in their registration statement.

In addition, regulations of the Department of Justice issued under the authority of Internal Security Act, and in force when the Communist Control Act was passed, contemplate that the Communist Party, if finally ordered to register, will continue to have and to function through employees. Thus, the regulations contain provisions with respect to the "executive officer" of a registrant who is defined as follows (28 C. F. R. 11.1(f), emphasis supplied):

> "The individual who directs the course of business of the orgnaization or *who outlines the duties*

[26] The Department of Justice has stated: "The Communist Control Act of 1954 does not purport to dissolve or require the dissolution of the Communist Party. Enactment of this legislation has not, *per se*, caused said Party to cease to exist as a group of persons associated together for joint action on certain subjects." Brief for Respondent Pursuant to the Court's Order of September 13, 1954 (p. 40) in *Communist Party* v. *Subversive Activities Control Board*, No. 11850, C. A. D. C.

> *and directs the work of subordinate employees* and who is responsible for the day to day operation of the organization's affairs and for carrying into effect *the purposes of his employment.*"

The regulations also require a Communist-action organization registered under the Act to maintain records which disclose the names and addresses of *employees* of the registrant (28 C. F. R. 11.204(b)).

Accordingly, section 3 of the Communist Control Act could not have been intended to and did not terminate the right of petitioners to have and to function through employees. The argument to the contrary flies in the face of the statute.

C. The construction of Section 3 by the court below is without support in the legislative history and is contrary to the construction of the section by the federal executive and by Congress.

The Communist Control Act was passed in August, 1954, on the eve of the adjournment of Congress for the national election campaign. It had its origin in the Butler Bill, S. 3706, 83rd Cong., 2d Sess. (100 Cong. Rec. 14097) to amend the Internal Security Act by making provisions with respect to "Communist-infiltrated organizations."[27] In the course of the floor debate, Senator Humphrey offered an amendment in the nature of a substitute which was later adopted as an addition to the original bill (*id.* pp. 14208, 14229, 14234-36). The heart of the Humphrey amendment was contained in section 3 of the bill passed by the Senate and makes membership in the Communist Party a criminal offense.[28]

The House rejected section 3 of the Senate bill when informed that the administration opposed it on the ground

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[27] The substance of the Butler Bill now appears as Section 3(4A) and 13A of the Internal Security Act, 50 U. S. C. 782(4A) and 792(a).

[28] Senator Humphrey stated that the purpose of his amendment was to refute the Republican charge that he and his party were "'soft' toward Communism" (*id.* pp. 14210, 14212).

that it would jeopardize enforcement of the registration provisions of the Internal Security Act. Instead, the House passed a bill containing section 3 as it was ultimately enacted. (*Id.* pp. 14639-40, 14658.) There were no committee reports on this section. Indeed, the House Judiciary Committee did not even see the House version of section 3 before it was offered on the floor. Moreover, the complete text of the House bill was not available to the members when they voted to adopt it. (*Id.* pp. 14643, 14651.) Representative Celler, the senior minority member of the Judiciary Committee, described the situation as follows (*id.* p. 14643, emphasis supplied):

> "Mr. Speaker, this is a most unusual bill—brought up in a most unusual manner. Consider its history—the confusion, the turmoil, the excitement, the haste and the celerity with which it is being considered now at this fag end of the session * * *. We only have a mimeographed copy of this bill that is now before us, and that copy is not complete * * *. The Judiciary Committee never saw the instant bill. It was cooked up over the weekend. It was cut and recut, furbished and refurbished, shuffled and reshuffled. It is indeed a hodgepodge. * * * Now, we are, in a way, buying a pig in a poke. *What does this bill really entail? Nobody really knows.*"

It appears from the House debate that the text of Section 3 was taken from H. R. 8912, which had been introduced by Representative Dies. However, the Dies Bill contained an additional provision, similar to the Humphrey amendment, making membership in the Communist Party a crime (*id.*, p. 14652). Mr. Dies described the effect of the omission of this provision as follows (*ibid.*):

> "Here is the situation: You outlaw the Communist Party; you terminate its rights and privileges and its immunities. But you have no provision in the bill to enforce it."

The Senate adopted the House bill but added, as Section 4, the text of Senator Humphrey's original proposal making membership in the Communist Party a crime (*id.*, pp.

14721, 14726, 14728-29).[29] The conference committee reported the bill in its final form,[30] which retained Section 3 as adopted by both Houses but substituted a new text for the Senate version of Section 4.[31] The conference report is confined to a statement concerning the latter section and does not mention Section 3 (*id.*, p. 15101).

Apart from the comment of Representative Dies, quoted above, the legislative history contains no interpretations of Section 3 except for expressions of personal opinion by several Senators in the course of the floor debate. These comments are entitled to no weight in construing the Act. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474. Furthermore, as Senator Morse observed, "almost every possible conflicting point of view which human minds can imagine or concoct has been stated for the Record this morning" (*id.*, p. 15115).[32]

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[29] The Senate also added a section listing thirteen criteria for determining membership in the Communist Party which became Section 5 of the Act (*id.* 14722).

[30] "But in fact no formal meeting of the conferees seems to have taken place. Rather the final change was wrought in a backstage compromise between all concerned." *The Communist Control Act of 1954* (Comment), 53 Mich. L. Rev. 1153, 1157.

[31] The section as enacted makes members of the Communist Party "subject to all of the provisions and penalties of the Internal Security Act of 1950, as amended, as they apply to members of a Communist-action organization." Except that it identifies the Communist Party, by name, as a Communist-action organization, the section adds nothing to what is already provided by the Internal Security Act. The Department of Justice has acknowledged this to be the case. Brief for Respondent Pursuant to the Court's Order of September 13, 1954, *supra*, at pp. 42-45.

[32] Thus, Senator Kefauver stated that Section 3 "amounts only to making a speech against the Communist Party" (*id.* p. 14718) and Senator Hennings regarded it as "only a gesture" (*id.* p. 14720). Senator Butler believed that Section 3 "makes the Communist Party impossible" (*id.* p. 14713). Senator Humphrey doubted that Section 3 would bar the Communist Party from the ballot since this is a matter for determination by the states and not by Congress (*id.* p. 14722). Senator Ferguson was alone in suggesting that Section 3 would prevent the Communist Party from hiring persons "under contract" or entering into other contractual relations (*id.* p. 14719).

Accordingly, the legislative history lends no support to the interpretation of Section 3 by the court below. What it does is to document the observation of Senator Kefauver (*id.*, p. 15106) that, "In this matter, I think we are giving a clear and impressive picture of how legislation should not be written." [33]

As we will now show, the interpretation below of Section 3 is contrary to that of the federal agencies responsible for its enforcement and of Congress.

When President Eisenhower signed the Communist Control Act he stated that its full impact "will require further careful study" (*N. Y. Times*, Aug. 25, 1954). Such study has resulted in no action by the federal authorities to apply the Act's fiat deprivation of rights, privileges and immunities.[34]

No attempt has been made, for example, to terminate such federal rights or privileges of the petitioners as their use of the mails or radio, television and other instrumentalities of interstate commerce.[35] Nor has the Department of Justice ever suggested that Section 3 deprives petitioners of any procedural right. Cf. *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, No. 12 this Term.

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[33] For examples of public criticism of the substance of the Act and the manner of its adoption, see the newspaper editorials, *id.* pp. 15110-15112.

[34] Cf. the conclusion of the author of the comment on the Act in 53 Mich. L. Rev. 1153, 1164: "In the light of the politically charged history of the Communist Control Act, and in view of the difficulty inherent in defining the potential effectiveness of the act, it is conceivable that it will be allowed to die on the statute books. There is, it is submitted, much to be said for such a result."

[35] To do so would contravene the proviso of Section 3 against a construction which amends the Internal Security Act. For the Internal Security Act gives the Communist Party access to these facilities, subject to a labelling requirement, even if it is finally ordered to register as a Communist-action organization. See 50 U. S. C. 789.

The Bureau of Internal Revenue, although aware of the Industrial Commission's ruling, continues to tax petitioners under the Federal Unemployment Tax Act (R. 41, *supra*, p. 7), and under the Insurance Contributions Act (R. 31). These federal statutes, like the New York Unemployment Insurance Law, tax employers on the wages paid by them. See 26 U. S. C. 3111, 3301; N. Y. Labor Law, Sec. 570. Definitions of the terms which determine liability to taxation are substantially the same under all three statutes.[36] It is clear, therefore, that the Bureau of Internal Revenue rejects the view that the Communist Control Act terminated petitioners' status as employers or their liability to taxation as such.

Similarly, a Social Security Administration referee ruled subsequent to enactment of the Communist Control Act that petitioners are employers whose retired employees[37] are entitled to old age benefits. *Matter of Foster*, R. 26-32. In reaching this conclusion, the referee cited the long-standing practice of the Internal Revenue Bureau in taxing petitioners (R. 31) and further stated (R. 29):

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[36] All three statutes define "Employer" only in terms of inclusions or exclusions which are irrelevant here. Labor Law, Sec. 512; 26 U. S. C. 3121(h), 3306(a). The state statute defines "wages" as "every form of compensation for employment" and defines "employment" as "any service under any contract of employment for hire, express or implied, written or oral." Labor Law, Secs. 511, 517, 518. Both federal statutes define "wages" as "all remuneration for employment" and define "employment" as "any service of whatsoever nature performed * * * by an employee for the person employing him." 26 U. S. C. 3121(a), 3121(b), 3306(b), 3306(c). They define "employee" in terms of "the usual common law rules applicable in determining the employer-employee relationship." 26 U. S. C. 3121(d)(2), 3306(i). The state statute does not define "employee". New York has held that the test of an "employer" is identical under the state and federal unemployment insurance laws. *Savoy Ballroom Corp.* v. *Lubin*, 146 N. Y. S. 2d 69.

[37] The Social Security Acts definition of "employees" (42 U. S. C. 410(k)(2) is identical with that of the Insurance Contributions Act.

> "In reference to the attitude of Congress toward Communism, as expressed in other legislation, and to which the referee will refer later, the referee will point out here that although the subject of Communism has been frequently considered by the Congress, and although there have been frequent and major studies and revisions of the Social Security Act by the Congress in the past two decades, nowhere in the Committee Reports on Social Security legislation, has the Congress suggested that service for the Communist Party in the United States was or should be considered excepted service." [38]

The *Foster* decision is dated June 21, 1956 (R. 32). A month later, Congress passed comprehensive amendments to the Social Security Act and the Insurance Contributions Act. Among these were provisions excluding from social security coverage and taxation services in the employ of an organization subsequent to the date on which it is finally ordered to register as a Communist-action or Communist-front organization under the Internal Security Act. 42 U. S. C. 410(a)(17) and 26 U. S. C. 3121(b)(17), added by sees. 121(c) and (d) of the Act of August 1, 1956, 70 Stat. 839. These provisions were written into the legislation by the conference committee after the decision in *Matter of Foster* and were evidently inspired by it.[39]

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[38] The specific issue before the referee was whether employment by petitioners was excepted from social security coverage as service performed in the employ of a foreign government (R. 27). As appears from the quoted excerpt, however, the decision was not so narrowly confined. And see also R. 30-32.

[39] The legislation passed the House on July 18, 1955 (101 Cong. Rec. 10768, 10798). It was reported to the Senate with amendments on June 5, 1956 (Sen. Rep. No. 2133, 84th Cong., 2d Sess. to accompany H. R. 7225). It passed the Senate on July 17, 1956 (102 Cong. Rec. 13103). It went to conference on July 19, 1956 (102 Cong. Rec. 13567) where, as stated above, the provisions in question were added. The conference report was adopted by both Houses without debate (102 Cong. Rec. 14828, 15106-07).

If Congress had believed that the Bureau of Internal Revenue and the *Foster* referee had erred in failing to rule that section 3 of the Communist Control Act excepts petitioners from social security taxation and their employees from coverage, it would have rectified the error by appropriate amendments to the Insurance Contributions Act and the Social Security Act. Instead, it adopted amendments which do not presently except the petitioners from taxation or their employees from coverage and will not except them unless and until petitioners are finally ordered to register as Communist-action organizations.[40] Accordingly, Congress acquiesced in the proposition that the Communist Control Act did not affect petitioners' liability to employment taxes, and gave that proposition the force of law. *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479.

Furthermore, without reference to the action of the Bureau of Internal Revenue and the *Foster* referee, if Congress had construed the Communist Control Act as having already terminated the liability of petitioners to taxation as employers, it would not have amended the Insurance Contributions Act in a manner which will exclude them from such taxation only in the event that they are finally ordered to register as Communist-action organizations. Cf. *F. H. A.* v. *The Darlington, Inc.*, 358 U. S. 84, 90.

The interpretation of section 3 of the Communist Control Act by the court below is therefore contrary to that of Congress.

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[40] See *Communist Party* v. *Subversive Activities Control Board*, *supra*.

II. Section 3 of the Communist Control Act is unconstitutional on its face and as applied below.

A. Section 3 violates the due process clause of the Fifth Amendment.

1. *Substantive due process.*

Due process requires that governmental regulation "shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U. S. 502, 525. Hence, "legislation not reasonably restricted to the evil with which it is said to deal" violates due process. *Butler* v. *Michigan*, 352 U. S. 380, 383.

The evil with which the Communist Control Act purports to deal is stated in section 2. That section declares that the Communist Party is "an instrumentality of a conspiracy to overthrow the Government of the United States," carries out policies "secretly prescribed for it by the foreign leader of the world Communist Movement," acts "as the agency of a hostile foreign power," and constitutes "a clear, present and continuing danger to the security of the United States." The evil, therefore, consists in the threat to the national security from these alleged activities of the Communist Party.

Section 3, however, is not restricted to the prohibition or control of these or other activities of the Communist Party which threaten the national security. As construed and applied below, the section deprives petitioners of all of their rights, including the right to engage, through employees or otherwise, in lawful and peaceable conduct which cannot endanger the nation even remotely. Accordingly, the Act violates the due process principle stated above. It would "burn the house to roast the pig." *Butler* v. *Michigan, supra*, at 383.

2. *Procedural due process.*

The court below held that section 3 does not violate due process in terminating petitioners' rights without a hearing. The prevailing opinion states (R. 38-49), "We see no denial of due process in the deprivation of [petitioners] of their status [as employers] without a hearing" because the recitals of petitioners' alleged misdeeds in section 2 of the Act "are so well established and known that recognition of them without further proof is a right and duty."

The holding below contravenes the decisions of this Court. The Fifth Amendment prohibits Congress from depriving an organization of liberty or property without according it a hearing on the charges against it which are relied upon to support the deprivation. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. "This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society" (*ibid.* at 168, concurring opinion). Accordingly, the legislature may not substitute its own finding of fact for proof at a hearing of any fact required to support the charges. *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Manley* v. *Georgia*, 279 U. S. 1; *Tot* v. *United States*, 319 U. S. 463.

The Communist Control Act violates this principle. The right of petitioners to be employers, like the other rights of which section 3 deprives them, is a form of their liberty and property protected by due process. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, and the decisions of the Court cited *supra*, p. 17. The justification for the deprivation, as stated in section 2, is that petitioners are members of a criminal conspiracy, controlled by a hostile foreign power, to overthrow our government. But the Act accords petitioners no hearing on this charge. Instead, section 2 finds that the charge is true, and section 3 deprives petitioners

of their liberty and property solely on the basis of the legislative fiat. "[G]overnment in this country cannot by edict condemn or place beyond the pale." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, at 178 (concurring opinion). Yet that is precisely what the Communist Control Act attempts to do. The denial of due process could not be more flagrant.

B. Section 3 is a bill of attainder.

The Communist Control Act has all the characteristics of the classical form of bill of attainder described in *Cummings* v. *Missouri*, 4 Wall (71 U. S.) 277, 323:

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial.
>
> "* * * In these cases, the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces on the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs adduced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense. * * *
>
> "These bills are generally directed against individuals by name * * *."

The Communist Control Act is directed against the Communist Party by name. Section 2 pronounces the organization guilty of membership in a foreign controlled seditious conspiracy and declares that it should be outlawed. Section 3 terminates its rights, privileges and immunities.

On its face and as applied, section 3 imposes punishment. The deprivation of rights which it decrees is based solely on the criminal conduct of which section 2 finds the Communist Party to be guilty. The deprivation is both absolute and permanent. No future conduct of petitioners, no matter how exemplary, will restore the rights which section

3 denies them. Section 3, therefore, imposes punishment because "nothing that those persons proscribed by its terms could ever do would change the result." *American Communications Association* v. *Douds*, 339 U. S. 382, 414. See also, *Cummings* v. *Missouri*, *supra*, and *United States* v. *Lovett*, 328 U. S. 303.

Furthermore, since section 3 as construed below deprives petitioners of *all* their rights, Congress was not concerned with any particular activity or status of the Communist Party. Instead, the statute was "evidently aimed at the person or classes of persons disqualified." This is one of the indicia of punishment. *Flemming* v. *Nestor*, 363 U. S. 603, 614; *Cummings* v. *Missouri*, *supra*.

United States v. *Lovett*, *supra*, at 316, held that a statute barring named persons from federal employment imposed "punishment, and of a most severe type" and therefore constituted a bill of attainder. If Congress may not, by legislative fiat, deprive named persons of the right to be employees, it may not deprive them of the cognate right to be employers. Accordingly, the *Lovett* case is controlling here.[41]

C. Section 3 is an *ex post facto* law.

> "By an *ex post facto* law is meant one which imposes punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings* v. *Missouri*, *supra*, at 325-26, quoting Chief Justice Marshall.

As we have just shown, the Communist Control Act imposes punishment on petitioners for their alleged partici-

[41] The case against the Communist Control Act is even stronger than that against the statute invalidated in *Lovett*. For the latter contained no express declaration of guilt. See 328 U. S. at 322-23 (concurring opinion).

pation in a seditious conspiracy. While such conspiracies were previously punishable by fine and imprisonment (18 U. S. C. 2384, 2385), section 3 imposes additional punishment in the form of a deprivation of rights. Moreover, unlike 18 U. S. C. 2384 and 2385 which require a judicial trial for conviction and punishment of the offense, section 3 imposes punishment by legislative fiat. Accordingly, the Communist Control Act is an *ex post facto* law as defined above. And see *Cummings* v. *Missouri*, *supra*, at 325-330.

D. Section 3 is not within the legislative power of Congress.

We have shown (*supra*, pp. 19-20) that the court below construed section 3 to deprive petitioner of rights granted by and dependent solely upon state law and that, so construed, the legislation is not within the competence of Congress and violates the Tenth Amendment.

III. The action of respondent in refusing to accept unemployment insurance taxes from petitioners and in suspending them as contributing employers under the New York Unemployment Insurance Law denied them due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

If the judgment below had been rested solely on a construction and application of the Communist Control Act, it would, of course, have presented no question under the Fourteenth Amendment. The prevailing opinion, however, seems at some points to hold that petitioners' status as contributing employers was terminated, not by section 3 of the Communist Control Act, but by action on the part of New York. Thus, the opinion states (R. 38):

> "The Appellate Division recognized in its opinion that the State might by appropriate steps prevent the Communist Parties 'from engaging in any activity or existence.' We think that the State of New York has already done so. The Attorney General, its highest law officer, argues to us on this appeal that

> the unemployment insurance officers acted validly in denying further recognition to the Communist Parties."

The prevailing opinion's reliance on state action also appears from the holding (R. 37, 39) that although Albertson's employment by the National Party postdated the Communist Control Act, he was nevertheless entitled to unemployment benefits because his employment occurred prior to the action of the Industrial Commissioner suspending the National Party as a contributing employer.

Furthermore, the amended remittitur (R. 48, 49) states that the court passed upon the question "whether the action of appellant as Industrial Commissioner in suspending the registrations of [petitioners] as employers under the Unemployment Insurance Law denied them due process of law or the equal protection of the laws in violation of the Fourteenth Amendment", and held "that the action of the Industrial Commissioner in no way violated or deprived respondents of their constitutional rights."

If, as the prevailing opinion says (R. 38), the action of the Industrial Commissioner was taken in implementation of "appropriate steps" by New York to "prevent the Communist Parties 'from engaging in any activity or existence' ", then it is those steps rather than the Communist Control Act which must be looked to in determining whether the Commissioner's action was justified. The opinion does not identify the "appropriate steps" to which it refers. None were taken by the state legislature, and no state statute is cited in support of the action of the Industrial Commissioner.

The Industrial Commissioner's initial determinations against petitioners (R. 14, 17) state that they were made pursuant to the opinion of New York's Attorney General (App. B, *infra*). Again, at the hearing before the referee, the Industrial Commissioner stated that he was relying exclusively upon the Attorney General's opinion as the

justification for his action (R. 20, 23-24). This opinion constitutes the only "appropriate steps" taken by New York. The opinion finds (*infra*, pp. 48-49) that "the Communist Party is a conspiracy against the Government of the United States and of this State" and concludes that "it would be an anomaly in law, not to say amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program."

It was pursuant to this opinion that the action of the Industrial Commissioner, if viewed as state action, was taken. His action deprived petitioners of liberty and property by tripling their unemployment insurance taxes and handicapping them in securing and retaining employees. These deprivations denied petitioners due process and the equal protection of the laws in violation of the Fourteenth Amendment.

A. The ruling of the Attorney General was based on his statement that the Communist Party is a conspiracy against the government. However, many New York employers have not only been suspected or accused but, unlike petitioners, have been convicted of criminal conspiracy and other crimes in the conduct of their affairs, including violations of the anti-trust laws, fraud and obscenity laws, fair rent laws and the like. Yet, such convicted employers have never been excluded from coverage under the Unemployment Insurance Law, and they and their employees continue to enjoy its benefits.

The Attorney General's opinion cites cases in which the New York Courts have held that workmen's compensation will not be paid to an employee for injuries sustained in the course of employment which is illegal (*infra*, p. 48). The principle of these cases, as the court below pointed out (R. 36), has no application here. It would not exclude petitioners from taxation, but would merely bar a particular applicant from receiving unemploy-

ment benefits upon a showing that his employment by one of the petitioners was for an illegal purpose.[42]

Neither in his written opinion nor as counsel for the Industrial Commissioner in this litigation can the Attorney General cite any instance in which an employer has been excepted from coverage under one of the state's social insurance laws even after conviction for conducting his affairs in violation of the criminal laws. The action of the Industrial Commissioner which singles out petitioners for exclusion from coverage was therefore arbitrary as well as discriminatory. Accordingly, his action denied petitioners both due process and equal protection. *Konigsberg* v. *State Bar*, 353 U. S. 252, 262.

B. The action of the Industrial Commissioner violates the due process principle applied in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 254-255. There, a contempt conviction for refusal to answer interrogations by the state attorney general into constitutionally protected subject matters was held to violate due process because the legislation establishing the attorney general as an investigating committee did not authorize him to secure the information which the interrogations sought. The Court stated (at 254), "No one would deny that the infringement of constitutional rights of individuals would violate the guarantee of due process where no state interest underlies the state action." It held (*ibid*) that "an equivalent situation is presented in this case."

"An equivalent situation" is likewise presented here. The state legislature enacted a comprehensive Unemployment Insurance Law which it has regularly reviewed and

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[42] Respondent states that petitioners "are constitutionally incapable of an innocent or legal act." Brief in Opposition to Petition for Certiorari, pp. 8, 20. This *ipse dixit* outrages common sense, flies in the face of the evidence in this case establishing that Albertson's employment was innocent (R. 21) and is contrary to the findings of both of the courts below (R. 34-35, 36-37).

amended.[43] Although the legislature thus had frequent occasion to do so, it never authorized the Industrial Commissioner to take the action he did or gave other indication that the exclusion of petitioners from unemployment insurance taxation was in the interest of the state. Under these circumstances, as in *Sweezy*, it does not appear that a "state interest underlies the state action." Since here, as there, the state action affected rights protected by due process, it follows, as in *Sweezy* (at 255), that the action "was not in accord with the due process requirements of the Fourteenth Amendment."

C. Although the basis for the action of the Industrial Commissioner was the Attorney General's charge that the Communist Party is a conspiracy against the government, there was no hearing on or proof of the charge. Accordingly, the Industrial Commissioner's action, viewed as state action, violates the due process clause of the Fourteenth Amendment for the reasons stated *supra*, pp. 30-31 in demonstrating that the Communist Control Act violates the Fifth Amendment.

Respondent argues that petitioners were not denied a hearing on the Attorney General's charges but could have offered evidence to disprove them at the hearing before the referee. (Brief in Opposition to Petition for Certiorari, pp. 19-20.) The argument is fallacious for two reasons.

First, the court below held (R. 38-39) that the "facts" with reference to petitioners' character as criminal conspirators "are so well established and known that recognition of them without further proof is a right and duty." It was obviously not open to petitioners to disprove charges which the highest court of New York holds that it is the duty of the state authorities to accept as proved.

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[43] *E.g.*, at its 1955 and again at its 1956 sessions, shortly before the opinion of the Attorney General and the ruling of the Industrial Commissioner.

Second, if it were true as a matter of New York Law, that the opinion of the Attorney General made out only a *prima facie* case of the truth of the charges against petitioners, an opportunity to disprove them at the referee's hearing would not satisfy the requirements of due process. *McFarland* v. *American Sugar Refining Co., supra; Speiser* v. *Randall,* 357 U. S. 513.

D. The action of the Industrial Commissioner terminated petitioners' status as contributing employers with respect to all of their employees, regardless of the character of the employment. Hence, even assuming a discernible state interest in excluding petitioners from unemployment insurance taxation with respect to employees engaged in illegal activity, the action taken would still violate due process because indiscriminate. See *supra,* p. 29.[44]

Conclusion

The judgment below should be reversed.

Respectfully submitted,

JOHN J. ABT,
320 Broadway,
New York 7, N. Y.
Attorney for Petitioners.

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[44] The action of the Industrial Commissioner, viewed as state action, also constitutes a bill of attainder in violation of Art. I, Sec. 1, Cl. 1 of the Constitution. This is true for the reason stated *supra,* pp. 31-32 and in *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 144 (concurring opinion).

Appendix A—Statutes Involved

The Communist Control Act of 1954, 50 U. S. C. 841-44, provides in part as follows:

Findings of Fact

Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present con-

stitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear, present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof,

by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

* * *

SEC. 5. In determining membership or participation in the Communist Party, or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

* * *

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

* * *

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

* * *

The New York Unemployment Insurance Law, Labor Law, secs. 500-643, provides in part as follows:

SEC. 511. Employment.—1. General definition. "Employment" means any service under any contract of employment for hire, express or implied, written or oral.

* * *

SEC. 512. Employer.—"Employer" includes the State of New York and any person, partnership, firm, association, public or private, domestic or foreign corporation, the legal representative of a deceased person, or the receiver, trustee or successor of a person, partnership, firm, association, public or private, domestic or foreign corporation.

* * *

SEC. 517. Remuneration.—1. Inclusions. "Remuneration" means every form of compensation for employment paid by an employer to his employee;

* * *

SEC. 518. Wages.—Limitation. "Wages" means all remuneration paid, except that such term does not include remuneration paid to an employee by an employer after three thousand dollars have been paid to such employee by such employer with respect to employment during any calendar year.

* * *

SEC. 570. Payment of contributions.—1 Rate. Each employer liable under this article shall pay contributions on all wages paid by him * * * Contributions shall be paid in an amount equal to two and seven-tenths per centum of such wages, except as otherwise provided by the provisions of sections five hundred seventy-seven and five hundred eighty-one of this article.*

The Federal Unemployment Tax Act, 26 U. S. C. 3301-3308, provides in part as follows:

Sec. 3301. Rate of tax

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1955 and for each

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* Sec. 577 provides for increasing the tax rate when the unemployment insurance fund becomes depleted. Sec. 581 prescribes the formula for determining the tax rate of the individual taxpayer in accordance with his experience rating.

calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 percent * of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)) after December 31, 1938.

Sec. 3302. Credits against tax

(a) Contributions to state unemployment funds.—

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 3301 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 3304.

* * *

(b) Additional credit.—In addition to the credit allowed under subsection (a), a taxpayer may credit against the tax imposed by section 3301 for any taxable year an amount, with respect to the unemployment compensation law of each State certified for the taxable year as provided in section 3303 ** (or with respect to any provisions thereof so certified), equal to the amount, if any, by which the contributions required to be paid by him with respect to the taxable year were less than the contributions such taxpayer would have been required to pay if throughout the taxable year he had been subject under such State law to the highest rate applied thereunder in the taxable year to any persons having individuals in his employ, or to a rate of 2.7 percent, whichever rate is lower.

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* Increased to 3.1 percent for 1961 and thereafter by amendment of September 13, 1960, 74 Stat. 980.

** Provides for the certification of state experience rating provisions which meet specified standards.

(c) Limit on total credits.—

(1) The total credits allowed to a taxpayer under this section shall not exceed 90 percent of the tax against which such credits are allowable.

* * *

Sec. 3306. Definitions

(a) Employer.—For the purposes of this chapter, the term "employer" does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was 4 or more.

(b) Wages.—For the purpose of this chapter, the term "wages" means all remuneration for employment * * *.

(c) Employment.—For the purposes of this chapter, the term "employment" means * * * any service, of whatever nature, performed after 1954 by an employee for the person employing him * * *.

(i) Employee.—For the purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * *

Appendix B—Opinion of the New York Attorney General

January 29, 1957

Hon. Isador Lubin
Industrial Commissioner
The Governor Alfred E. Smith
State Office Building
Albany 1, New York

Dear Commissioner Lubin:

Under date of August 22, 1956 you asked the opinion of former Attorney General Javits as to whether employment with the Communist Party of New York State or the Communist Party of the United States may form a basis for determining eligibility to unemployment insurance benefits under the New York State Unemployment Insurance Law; and whether compensation in such employment is subject to the payment of unemployment contributions under that law.

My answer to both questions is in the negative.

The Unemployment Insurance program operates under the auspices of, and is supervised and administered by, the Government of the United States and of this State. It appears to me implicit that the character and activities of the Communist Party foreclose it and its employees from the rights and privileges of participation in that program.

The nature of the Communist Party, its activities and objectives, have been characterized by the Congress of the United States in the Internal Security Act of 1950 and the Communist Control Act of 1954. To quote from the findings and declarations of fact in Section 2 of the latter Act (50 U. S. C., § 841):

> "The Congress finds and declares that the Communist Party of the United States, although pur-

> portedly a political body, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States."

The section concludes:

> "* * * the Communist Party should be outlawed."

Section 3 of the same Act (50 U. S. C., § 842) provides that the Communist Party, its successors, and subsidiary organizations

> "are not entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated."

I draw your attention also to the "Congressional Findings of Necessity" in the Internal Security Act of 1950 (Section 2; 50 U. S. C. A., § 781).

In this State, the Legislature has, in the Feinberg Law (L. 1941, ch. 360, §1) and in the Security Risk Law (L. 1951, ch. 233, § 1; Unconsolidated Laws, p. 1101), made findings of similar import in respect to the Communist Party.

The Court of Appeals of this State has written of the nature of the Communist Party (*Matter of Daniman* v. *Bd. of Education of the City of New York*, 306 N. Y. 532, 540):

> "In this court we are all agreed that the Communist Party is a continuing conspiracy against our Government. (See *Communications Assn.* v. *Douds*, 339 U. S. 382, 425 et seq.; *Dennis* v. *United States*, 341

U. S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, § 1.)"

The Supreme Court of the United States has voiced like opinions (*Dennis v. United States*, 341 U. S. 499; *American Communications Assn. v. Douds*, 339 U. S. 382) and held members of the Communist Party subject to being proscribed from rights and privileges such as that of being a teacher in the public schools of this state (*Adler v. Bd. of Education*, 342 U. S. 485).

The Subversive Activities Control Act, to which I have already referred, was upheld as constitutional by the United States Court of Appeals for the District of Columbia Circuit, which held that the Communist Party of the United States was required to register thereunder as a Communist-action organization (*Communist Party of U. S. v. Subversive Securities Control Board*, 223 F. (2d) 531). The Court said at one point:

> "* * * we perceive no reason why the presently existing government in this country should not * * * withdraw from its (Communist organization's) members protection and privileges otherwise afforded by that government."

As to the nature of the Communist Party in this country, see some of the observations of Circuit Judge Prettyman in the course of this opinion, for example, pages 565 to 576. The Supreme Court of the United States, on appeal thereto, remanded the case to the Board without reaching the question of constitutionality, because the testimony of three witnesses before the Board was contended to be possibly perjurious (351 U. S. 115).

The Communist Party has thus been declared by the highest Court of this State, by the Supreme Court of the United States, by the Congress of the United States, and by the Legislature of this State, to be a conspiracy against the government of the United States and of this State, and

as an organization, and as to members thereof, not entitled to protections and privileges otherwise offered by government.

Returning then to the question here before us, I find that your department in the past, in administering the Unemployment Insurance Law, and the Courts, in another area of social insurance, Workmen's Compensation, have denied these rights in the case of employees of employers engaged in enterprises which are illegal, or declared by the Legislature to be against public policy. You have enclosed in your letter two determinations (one in 1951 and one in 1952) by your department to such effect. One of these decisions quotes from an earlier one as follows:

> "The Unemployment Insurance Law does not confer benefits upon an employee in a business which has been declared by the legislature to be against public policy and the conduct of which involves a violation of the criminal law."

In a case arising out of a Workmen's Compensation claim for injury resulting in death to a bartender employed in a saloon when prohibition was in effect, the Appellate Division (3rd Dept.) dismissing the claim, declared:

> "This Court will not lend its aid to the enforcement of any claim growing out of a contract of employment one of the purposes of which is the violation of a law of the land * * * ".

For a like result, see also *Swihura* v. *Horowitz,* 215 App. Div. 740, aff'd 242 N. Y. 523.

It is my opinion that in light of the repeatedly declared views by the Courts and by the federal and this State's legislative bodies, that the Communist Party is a conspiracy against the Government of the United States and of this State, it would be an anomaly in law, not to say

amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program. To make such exclusion is, as I have set forth *supra*, matter of precedent. In so far as *scienter* on the part of the employee is concerned, it is certainly a fair inference that anyone now claiming benefits based on employment by the Communist Party during the past year (the base year for one now making unemployment insurance claims) had full knowledge of the nature, activities and objectives of the Communist Party.

I conclude, accordingly, that unemployment insurance contributions should not be received, pursuant to the New York State Unemployment Insurance Law, from the Communist Party of New York State or the Communist Party of the United States, and that employment by the Communist Party of New York State or the Communist Party of the United States should not be credited as a basis for determining unemployment insurance benefits under the statute by ruling of your department. The ultimate decision, of course, is in the courts, to which one considering himself aggrieved by your determination would have recourse.

Very truly yours,

LOUIS J. LEFKOWITZ,
Attorney General.